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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CRUZ ORTEGA,

Plaintiff, Cross-Defendant  
and Respondent,

v.

ROGER PEREZ,

Defendant, Cross-  
Complainant and Appellant,  
and

ALEX PEREZ,

Defendant and Appellant.

B296706

(Los Angeles County  
Super. Ct. No. BC657707)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Affirmed.

Erick Garcia for Defendant, Cross-Complainant and Appellant Roger Perez, and Defendant and Appellant Alex Perez.

No appearance for Plaintiff, Cross-Defendant and Respondent.

In June 2013, plaintiff, cross-defendant and respondent, Cruz Ortega, quitclaimed his interest in a parcel of real property to defendant, cross-complainant and appellant, Roger Perez. Four years later, Ortega filed the underlying action against Roger and his brother, defendant and appellant Alex Perez,<sup>1</sup> purportedly alleging claims for fraud, declaratory relief, quiet title, and cancellation of instrument.<sup>2</sup> Roger, in turn, filed a cross-complaint against Ortega for fraud, quantum meruit and unjust enrichment in June 2017.<sup>3</sup>

Pursuant to a pretrial stipulation between the parties, Ortega's complaint was dismissed in exchange for Roger's agreement to quitclaim the property back to Ortega, and Ortega's agreement to reimburse defendants for costs and expenses incurred for work they performed on the property, in an amount to be determined by the court. Following a bench trial, the court rejected defendants' claim that they were owed more than \$190,000 for construction and other services performed on the parcel during 2017. Instead, the court found Ortega owed defendants approximately \$38,600 in reimbursement, and that

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<sup>1</sup> To avoid confusion, we refer to the Perez brothers by their first names when discussing them individually and, collectively, as defendants when discussing issues related to both brothers.

<sup>2</sup> Ortega's complaint is not part of the appellate record.

<sup>3</sup> Alex and Roger are jointly referred to as defendants in the Statement of Decision and the judgment. However, the record indicates that, although both brothers were named in Ortega's complaint, only Roger was a party to the cross-complaint.

Roger failed to establish an entitlement to any recovery on his cross-complaint for fraud.

Roger and Alex appealed from the judgment. They contend that trial court erroneously applied the “clear and convincing evidence” burden of proof to Roger’s cross-complaint claim for fraud (the only claim at issue here and at trial), and that the issue of the damages Ortega owes must be remanded for retrial under the appropriate “preponderance of the evidence” standard. We conclude that even if such error occurred, it was harmless.<sup>4</sup> Accordingly, we affirm the judgment.

## **BACKGROUND**

By quitclaim deed executed and recorded on June 26, 2013, Ortega transferred a parcel of real property located at 6317-6319 South San Pedro Street in Los Angeles (Property), to Roger. The deed states Ortega received “A VALUABLE CONSIDERATION” in the exchange but also states, “THIS IS A BONAFIDE GIFT AND THE GRANTOR RECEIVED NOTHING IN RETURN.” At trial, Roger testified he acquired the Property in June 2013 from Ortega “like a gift.” Ortega never told Roger why he had gifted him the Property. Roger testified that, once the quitclaim deed was filed, he believed he owned the

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<sup>4</sup> Ortega has not filed a respondent’s brief in this appeal. Nonetheless, a judgment may be reversed only if prejudicial error is found (*In re Bryce C.* (1995) 12 Cal.4th 226, 232–233; *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203), and we have independently examined the record to determine whether, assuming error, it was prejudicial.

Property. He also claimed that, notwithstanding his gift, Ortega had promised to continue making the mortgage payments, but Roger was free to make improvements and/or sell the Property.

Roger retained a broker in February 2017 to sell the Property. In April 2017, Ortega sued defendants for fraud and quiet title, among other things, seeking to recover the Property. Roger and Alex answered the complaint, and Roger filed a cross-complaint against Ortega alleging claims for fraud, quantum meruit and unjust enrichment. Roger alleged that, since June 2013, he has made sure all “mortgage payments were made,” and has made improvements to and paid utilities for the Property. Roger claimed Ortega concealed from him the fact that he had quitclaimed the Property to Roger in order to evade creditors.

A three-day bench trial was conducted between August and October 2018. Prior to trial, the parties executed a written stipulation stating:

“1. On June 26, 2013, [Ortega] executed a quitclaim [deed] . . . recorded [the same day] . . . . The quitclaim transferred [Ortega’s] interest in the [Property] to Roger Perez.

“2. In reliance on the transfer of the [Property] by [Ortega], Defendants incurred costs related to the [Property].

“3. [Roger] will quitclaim his interest in the [Property] back to [Ortega] on the condition that Defendants be reimbursed for any and all costs associated with the [Property] incurred by Defendants as determined by the court at trial.

“4. The issue to be determined by the court is how much [Ortega] must pay Defendants. The parties stipulate that the court shall

determine how much [Ortega] must reimburse Defendants. The costs to be reimbursed are costs to manage the [P]roperty, repairs, costs, expenses, improvements, increase in value of . . . and all other expenses related to the [P]roperty. The court shall determine if the reimbursements are appropriate and in what amount.

“5. Each party reserves their right to assert defenses.

“6. The court shall not draw any inference from the foregoing stipulations.

“7. The stipulation is reached for the purposes of reducing the issues and in the interest of judicial economy.”

The parties also stipulated that Ortega would reimburse defendants \$39,252.84 as follows: \$21,652.84 (mortgage payments, plus utilities, permits, insurance and appraisal expenses incurred from April-December 2017); \$5,100 (purchase and installation of windows); \$5,500 (labor costs associated with plumbing and the installation of water heaters); and \$7,000 (materials and labor associated with the remodel of one unit). Finally, the parties stipulated that Ortega made all mortgage payments except those made from April to December 2017.

Trial proceeded on the issue whether Ortega owed any additional reimbursement, and Roger’s claim Ortega owed him more than \$192,000 for repairs performed and expenses he incurred in reliance on “Ortega’s promises.”

*Amalia Canales*

Alex's niece, Amalia Canales, is employed in an administrative capacity by her uncle's company, Alex Perez Construction, Inc. (company). She created spreadsheets reflecting, on a monthly basis, the final invoice to Roger for work the company performed and expenses it incurred in connection with the Property from April 21, 2017 through December 2017. These spreadsheets were not provided to Ortega's counsel until the day before trial.<sup>5</sup> None of the spreadsheets (exhibits admitted in evidence at trial, but not lodged on appeal) was supported by any receipts, cancelled checks or other substantiating documentation. Canales testified the spreadsheets accurately reflected the company's expenses and payroll for seven employees who worked on the Property during that period, each of whom was paid \$55 per hour (except Alex, who received \$60-75 per hour), and the company's payroll ranged from \$16,000 to \$30,000 every month. Employees were paid in cash. Canales, in turn, earns \$17 per hour, which she is paid by check after the company makes withdrawals for taxes and other costs. Canales testified that each spreadsheet contained only the final billing for a month. The company does not provide more detailed invoices unless a client requests it.

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<sup>5</sup> In response to an inquiry regarding defendants' delayed production of this evidence, Canales said she had contemporaneously prepared monthly drafts, but the spreadsheets were not provided to Ortega until after Alex reviewed and altered them.

*Roger Perez*

Roger's testimony was frequently unclear and riddled with contradictions. He testified Ortega deeded him the Property "like a gift" in June 2013, but never explained why. After the quitclaim deed was executed, Roger believed the Property was his and he could make any improvements or repairs or could sell the Property. He understood the Property had equity when Ortega gifted it to him but did not know how much. Thereafter, Ortega never told Roger the Property was not a gift or that he changed his mind and wanted it back.

Roger and Ortega each live in one of four units on the Property. Roger testified that neither he nor Ortega pays rent, nor have tenants in the other two units paid rent since June 2013. Roger never tried to evict Ortega, but did hire Alex to evict other tenants. Roger testified that he managed the Property and collected rents for the last six months of 2013, that Ramon Diaz had managed the Property and collected the rent since 2013, and that Roger had hired Alex to manage the Property.<sup>6</sup> Roger claimed to have made mortgage payments—which Ortega initially had promised he would continue to pay—with funds

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<sup>6</sup> At trial, Diaz, who is Ortega's cousin and Roger's friend, testified he managed the Property and collected tenants' rent (which he gave to Ortega), from 2013 until March 2017. He believed Ortega paid the mortgage during that time, but also testified that Roger did. Diaz was present when Ortega signed the quitclaim deed. Ortega told Diaz he gifted the Property to Roger because "he [Ortega] couldn't pay it." Diaz never heard Ortega say he regretted gifting the Property to Roger. Diaz also testified both that he had, and that he had not, seen repairs performed on the Property in 2017, and that he had and had not witnessed tenants damaging repair work after it was done.

Alex lent to him, but also testified the payments were (mostly) covered by rent collected from tenants.

Roger hired Alex and his company to manage the Property and make numerous improvements and repairs between 2016 and sometime in 2017. After Roger received two offers to purchase the Property in early 2017, Ortega told him to stop work. Roger claimed he would not have hired Alex's company to perform repairs had he not believed he owned the Property as a result of Ortega's gift. Alex presented Roger with numerous invoices, none of which has been paid. Roger still owes Alex \$171,000 for work performed on the Property by his company. The only improvements and repairs identified at trial were those that had been demanded by the city after it performed an inspection in 2017. Roger did not know which repairs the city had mandated, nor could he recall what Alex charged him for painting. Roger did not object to a rate of \$55 per hour for each of Alex's employees because he "hop[ed] that [his] brother would be paid that sum of money" by Ortega.

#### *Alex Perez*

Alex is a general contractor whose company has six employees. Canales manages the company's invoices, but Alex keeps all original receipts to send to a notary for taxes. Clients are invoiced twice a month, but Alex sometimes advances client costs for big jobs.

In April or May 2017, following a city inspection, Roger hired Alex to manage the Property and retained his company to perform required repairs, maintenance and improvements. Due to setbacks caused by



tenants, Alex and his employees took four months to perform “preparation work” and painting. Some of the work had to be re-done as many as five times due to tenant interference. Alex testified that, on average, three of his employees worked eight hours per day at the Property, but also claimed he and his employees had worked as many as 15 hours per day, five days per week for four months to perform the work necessary to pass inspection. Alex charged Roger \$75 per hour for his management and construction services and paid each of six employees \$55 per hour (approximately \$25,000 per month). Contradicting testimony given during his deposition (in which he said employees were paid by check), Alex testified first that he always paid employees in cash, and later that he paid them both by check and in cash. Alex had no cancelled checks or other receipts to show whether or how much his employees were paid.

All fees for repair work performed—initially and each time it had to be re-done—were billed to Roger. Ortega was aware Alex’s company was doing repair work but never told Alex to stop. Alex testified that he is owed over \$192,000 for the labor and materials his company devoted to work performed on the Property. Alex conceded he had not had \$192,000 in the bank, but also claimed he withdrew \$192,000 from his account and deposited that cash in Roger’s account for Property related expenses. Alex had no documentation to substantiate this claim.

### *Florentine Ochoa*

The final witness at trial, Florentine Ochoa, has lived in the same unit on the Property for over 30 years, and has always made his rent payments to Ortega. Ochoa, who is retired, is almost “always” at home. He saw three people painting the exterior of the Property in 2017; they worked about four days. Alex had not been among those workers, and Ochoa never saw him working at the Property 15 hours per day, five days a week at any time from April through July 2017.

### *Trial Court’s Ruling*

After the parties submitted closing briefs, the trial court issued its Statement of Decision (SOD). Pursuant to the parties’ stipulation, Ortega was ordered to reimburse Roger and Alex \$38,652.84 for out-of-pocket expenditures,<sup>7</sup> and defendants were ordered concurrently to execute grant deeds conveying their interest in the Property to Ortega. The trial court observed that defendants, who bore the burden of proof on the issue, “failed to submit any other credible, reliable or satisfactory evidence of additional damages.” According to the SOD, the court found Alex’s testimony “not credible” and gave “no weight to the exhibits submitted by defendants” which “lacked specificity and documentary evidence to support the alleged expense.” Accordingly, the court “refuse[d] to award any additional damages.” As to the cross-complaint, the court found Roger failed to establish that Ortega committed fraud.

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<sup>7</sup> This sum was \$600 less than the amount to which the parties agreed, but Ortega has not taken issue with the award.

## DISCUSSION

On appeal, defendants contend the trial court erred when it applied a “clear and convincing evidence” standard to find Roger failed to establish Ortega committed fraud in conveying the Property to him in the “guise of a gift.” They also maintain that, had the court made its determination based on the appropriate evidentiary standard of a preponderance of evidence, Roger established that he was a victim of fraud. We conclude that any error is harmless. Whatever standard of proof is applied, Roger failed to establish a civil claim of fraud.

The court found Roger failed to establish a claim of fraud based on the following:

“Under California law, a cause of action for fraud requires the [Defendant] to prove (a) a knowingly false misrepresentation by the [Plaintiff], (b) made with the intent to deceive or to induce reliance by the [Defendant], (c) justifiable reliance by the [Defendant], and (d) resulting damages. (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807.)

“The elements of fraud must be pleaded specifically and with particularity. Every element of fraud must be alleged properly and with sufficient specificity to allow Defendant to understand fully the nature of the charge made. [Citation.] (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

“The evidence *must be supported by clear and convincing evidence*. There was an absence of evidence to support each element.

“As such, the court finds that [Ortega] is not liable to Defendants for fraud.” (Italics added.)

Relying on *Liodas v. Sahadi* (1977) 19 Cal.3d 278 (*Liodas*), defendants correctly observe a claim for civil fraud need only be proved by a preponderance of the evidence. (*Id.* at pp. 286, 288–291; *Weiner v.*

*Fleischman* (1991) 54 Cal.3d 476, 484–485; Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”]) We review the appeal in context. Roger did not initially allege a straightforward claim of civil fraud. Rather his cross-complaint is premised on the contention that to further Ortega’s intention fraudulently to convey title to the Property in order to evade his creditors, Roger nevertheless reasonably relied on Ortega’s intentionally false representation that the Property was a gift, and suffered injury as a result.

Roger reads *Liodas, supra*, 19 Cal.3d 278, too broadly. In holding that the standard of proof in civil cases in which fraud is an issue is preponderance of the evidence (*id.* at pp. 286–293), the Supreme Court did not reject the clear and convincing standard of proof for all civil cases. “In fact, *Liodas* noted that under Evidence Code section 115, the clear and convincing evidence standard is “an alternative” standard of proof that “is required on certain issues” by statute or by case law . . . .’ [Citation.]” (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61; see 5 Witkin, Summary of Cal. Law (11th ed. 2020) Torts, § 886, p. 1214 [observing that the Supreme Court has held that, “in fraudulent conveyance cases as well as others in which the issue of fraud [is] involved,” the preponderance of evidence standard controls]; see e.g., *Conservatorship of Wendland*

(2001) 26 Cal.4th 519, 546 [default standard of proof in civil cases is preponderance of the evidence].)<sup>8</sup>

Again, Ortega's complaint is not in the appellate record. Thus, we know only that Roger's cross-complaint was filed in response to Ortega's claims of, among others, fraud and quiet title. Ortega's claims clearly arose from his 2013 conveyance of real property. However, before trial, the parties agreed Ortega would dismiss his action in exchange for a reconveyance to him of title to the Property. Thus, the action proceeded to trial only on the question of damages, that is, what amount Ortega admittedly owed defendants to reimburse them for work performed on his Property, and whether and in what amount Roger suffered injury as a result of Ortega's alleged garden variety fraud.

Had Roger sought to maintain ownership of the Property based on a claim that Ortega's "gift" was actually a fraudulent conveyance, the court is correct that Roger would have to establish such a claim by clear and convincing evidence.<sup>9</sup> But it appears this was not the case. The

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<sup>8</sup> "Generally, a higher burden of proof applies only where particularly important individual interests or rights, which are more substantial than the loss of money, are at stake. [Citations.] Thus, for example, the clear and convincing evidence burden of proof has been applied where constitutional due process rights or important general public policy considerations are implicated. [Citation.]" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 365.)

<sup>9</sup> Where a claim of fraud attempts to rebut the legal and beneficial title to real property, the standard of proof is clear and convincing evidence. (See Evid. Code, § 662 ["The owner of the legal title to property is presumed to be the owner of the full beneficial title. *This presumption may be rebutted only by clear and convincing proof*"], italics added; Evid. Code, § 520 ["The party claiming that a person is guilty of . . . wrongdoing has the burden of proof on

logical implication of the parties' stipulation regarding Roger's duty to retransfer title is that the quitclaim deed was invalid and the Property belonged to Ortega. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377–379, overturned by legislation re insolvency (Civ. Code, § 3439.02).) Whatever the parties' initial allegations, by the time the case proceeded to trial, it was apparently agreed that Ortega owned the Property, and the only remaining disputes were how much he owed defendants for work performed on his Property, and whether he committed fraud.

Nonetheless, assuming the trial court erred, we conclude that, regardless of the governing evidentiary standard, it is abundantly clear on this record that the court correctly found Roger failed completely to produce competent, credible evidence to establish each element of a claim of civil fraud.

“[W]e review the entire record in the light most favorable to the judgment to determine whether there are sufficient facts, contradicted or not contradicted, to support the judgment.” (*Patricia A. Murray Dental Corp. v. Dentsply Internat., Inc.* (2018) 19 Cal.App.5th 258, 270.) “Where, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing [party], we presume the trial court found [that party's] evidence lacks

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that issue”].) This implicit finding comports with Civil Code section 3439.07 which defines a fraudulent conveyance as one made with an actual intent to hinder, delay or defraud present or future creditors. No such finding was made here, nor would Roger have had standing to assert such a claim. No such interests are at stake here.

sufficient weight and credibility to carry the burden of proof.

[Citations.] We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence.’ [Citation.]” (*Ibid.*) “It is settled that, ‘in a bench trial, the trial court is the “sole judge” of witness credibility.’” (*Davis v. Kahn* (1970) 7 Cal.App.3d 868, 874.) Its credibility determinations are subject to extremely deferential review. (*La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 345–346 [“[A] trial judge has an inherent right to disregard the testimony of any witness . . . [and] is the arbiter of the credibility of the witnesses”].) (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582 [the appellate court’s “job is only to see if substantial evidence exists to support the verdict in favor of the prevailing party, not to determine whether substantial evidence might support the losing party’s version of events”]; *Jennifer K. v. Shane K.* (2020) 47 Cal.App.5th 558, 579.) “Evidence of witnesses, especially those who have a biased or prejudiced interest in the result of the trial in which they testify, need not be accepted at face value.” (*Koivunen v. States Line* (9th Cir. 1967) 371 F.2d 781, 783.)

Even if, as Roger alleged, Ortega transferred the Property to evade creditors, it is implicit in the record that, far from being a victim of Ortega’s fraud, Roger was likely complicit in that effort for which he was rewarded (having lived rent free since 2013). More importantly, the trial court found no credible evidence to support defendants’ claim that Ortega owed Roger \$192,000 for damages he and his brother suffered due to Roger’s reasonable reliance on Ortega’s “gift.” There is

no evidence Ortega owes defendants anything for work performed beyond the \$38,000 already awarded. Roger clearly had nothing more than a rudimentary understanding of the type or amount of work performed by Alex's company, or what he was billed for that work. As for Alex, the trial court found he was not credible. It also found that defendants, who had the burden, failed to provide any reliable evidence to substantiate their claimed injuries.

In sum, the trial court's credibility findings compel the conclusion that, regardless of the standard of proof, Roger failed to establish he reasonably relied on Ortega's false representations or that he suffered injury as a result. In short, evidence that is not credible or does not exist cannot, as a matter of law, prevail under any standard of proof.

### **DISPOSITION**

The judgment is affirmed. Neither party is awarded costs on appeal.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.